No. 22637

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE E. DANIELSON, *et al.*,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Opening Brief of Appellants, Trustees in Bankruptcy of Los Angeles Trust Deed and Mortgage Exchange.

GENDEL, RASKOFF, SHAPIRO & QUITTNER,
By RICHARD S. BERGER,
6380 Wilshire Boulevard,
Los Angeles, Calif. 90048,

Attorneys for Appellants Trustees in Bankruptcy of Los Angeles Trust Deed and Mortgage Exchange.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Miscellaneous

Statutes

II.
STATEMENT OF THE CASE.

Prior to October 8, 1962, a controversy existed between appellants, Trustees in Bankrupty of Los Angeles Trust Deed and Mortgage Exchange [hereinafter referred to as "Trustees"], and David and Betty Jane Farrell [hereinafter referred to as "Farrells"]. On October 8, 1962, the Trustees applied to the bankruptcy court for authority to compromise their controversy with the Farrells [R. 44]. Said application provided that in consideration of the Trustees' relinquishment of their claims against the Farrells, the Farrells would transfer and assign to the Trustees all of their assets, with the exception of certain specifically enumerated properties. In conjunction with this application, the Farrells filed affidavits purporting to set forth a list of all real and personal property, both tangible and intangible, in which the Farrells had any interest whatsoever [R. 51, 57].

Referee Ronald Walker approved the above described compromise on November 21, 1962 [R. 59]; that order provided on page 5 thereof [R. 63]:

> "ORDERED, ADJUDGED AND DECREED that in the event DAVID or BETTY JANE FARRELL had any right, title or interest in or to any property, real or personal, tangible or intangible, as of June 27, 1962, which was not described in the affidavits of DAVID and BETTY JANE FARRELL attached to the Trustees' Application to Compromise and which was not exempt from creditors, then any such property shall be deemed to have been conveyed and transferred to the Trustees in Bankruptcy herein, and DAVID and BETTY JANE FARRELL shall execute or cause to be executed immediately upon demand from the Trustees, such documents as may be required to effectuate

> and perfect a transfer and conveyance of such properties to the Trustees in Bankruptcy herein, but this clause shall not in any way be deemed to affect that property which was first acquired subsequent to June 27, 1962; . . ."

The Farrells did not disclose in their affidavits that on July 25, 1961, they had filed a claim for overpayment of income tax for the year 1959, and on July 26, 1961, they had filed a similar claim for overpayment of tax for the year of 1960. Subsequently, on April 29, 1963, the Farrells filed a claim for overpayment of tax for the year 1958 and amended their claim for the refund for the year 1959. The three tax refunds were based upon carryback loss claims for the respective years.

In the Order of November 21, 1962, transferring the Farrells' property to the Trustees, the particular properties reserved to the Farrells were enumerated. Nowhere did the Order, or the Application, or the agreement between the Farrells and the Trustees reserve to the Farrells the carryback loss claims. The property to be retained by the Farrells, in addition to the items specifically set forth, was personal property exempt from creditors under California Code of Civil Procedure section 690. The Trustees, upon discovering that the Farrells were prosecuting claims for refund of taxes, declared their interest in said refunds [Affidavit of James A. A. Smith and Declaration of Interest, R. 37] and have continually asserted their right to said refunds.

On May 14, 1962, David Farrell was convicted of a felony and his sentence included a fine of $81,500.00 [R. 2-4]. Farrell appealed [R. 5] and on February 10, 1964, the judgment was affirmed [R. 6].

On July 10, 1962, the Trustees acquired title to a property known as the Bloomfield Factory. The Trustees wished to clear this property of liens. At that time there existed, according to government records, an income tax lien against the Bloomfield Factory because of income taxes owed by the Farrells in a sum in excess of $38,000. In order to clear the property of the tax lien, the Trustees paid to the government, from the funds of Los Angeles Trust Deed and Mortgage Exchange, the sum of $39,090.02 on July 19, 1962 [R. 41-42].

On June 29, 1967, the Tax Court of the United States, pursuant to a stipulation between the Farrells and the United States [R. 70] entered judgment in favor of the Farrells in the sum of $73,964.82, plus interest as provided by law [R. 68]. The total sum should, therefore, exceed the sum of $100,000.00.

On July 28, 1967, the government filed a Notice of Motion to Transfer Monies, claiming that the funds resulting from the tax court judgment in favor of the Farrells [R. 68] should be transferred to the government to satisfy the still unpaid criminal fine imposed upon David Farrell. On October 17, 1967, the government's motion was granted [R. 149], the court order stating, *inter alia:*

> "The transfer of assets of David Farrell and Betty Jane Farrell to the trustees of the Los Angeles Trust Deed and Mortgage Exchange did not operate to transfer an inchoate right to refund of taxes (31 U.S.C. § 203) . . ."

Appellant Trustees' motion for reconsideration [R. 151] was denied on December 14, 1967 [R. 166].

III.
ISSUES PRESENTED.

1. Were the Farrell carryback loss claims capable of being transferred by the Order of November 21, 1962, compromising a controversy between the Farrells and the Trustees?

2. If the carryback loss claims were capable of being transferred, was such transfer nevertheless voided because of non-compliance with the provisions of the anti-assignment of claims statute, 31 U.S.C. §203?

IV.
ARGUMENT.

A. A Carryback Loss Claim Is "Property" That Can Be Assigned.

The question whether a carryback loss claim is "property" or an interest in property, was considered in the recent case of *Segal v. Rochelle,* 382 U.S. 375, 15 L. Ed. 2d 428, 86 S. Ct. 511 (1966), where the Supreme Court held that a carryback loss claim became the property of a trustee in bankruptcy under the provisions of section 70(a)(5) of the Bankruptcy Act, 11 U.S.C. §110(a)(5), and that a carryback loss claim was an interest or property that could have been assigned by the bankrupt prior to the date of his bankruptcy. (382 U.S. at 378-382, 86 S. Ct. at 514-517).

That a carryback loss claim is "property" is also clear from *In re Donley,* 242 F. Supp. 403, 406-407 (E.D. Mo. 1965), and by implication from *In re Goodson,* 208 F. Supp. 873 (S.D. Cal. 1962), where a claim for wage withholdings for income tax purposes was held to be assignable "property."

The validity of an assignment, excluding controlling federal questions, is determined pursuant to the law of the state in which the assignment was made. See *Danning v. Mintz,* 367 F. 2d 304 (9th Cir. 1966) cert. denied, 386 U.S. 990, 18 L. Ed. 2d 335, 87 S. Ct. 1305 (1966). Accordingly, an examination must be made of California law.

The public policy of California favors the modern view of permitting the free transferability of all types of property. See, *Farmland Irrigation Co. v. Dopplmaier,* 48 Cal. 2d 208, 308 P. 2d 732 (1957). Although the California courts have not dealt with the particular problem of a carryback loss claim, the existing California decisions on analogous situations compel the conclusion that such claims would be held to be assignable property. Analogous California cases holding particular inchoate rights to be assignable property include: *Farmland Irrigation Co. v. Dopplmaier, supra,* [assignment of patent licenses]; *Fricker v. Utto & Taormina Co.,* 48 Cal. 2d 696, 312 P. 2d 1085 (1957) [assignment of interest in monies to be paid for crops not yet planted]; *Dougherty v. California Kettleman Oil Royalties, Inc.,* 9 Cal. 2d 58, 69 P. 2d 155 (1939) [assignment of percentage of oil to be produced]; *Bridge v. Kedon,* 163 Cal. 493, 126 Pac. 149 (1912) [assignment of money to be earned under existing contract]; *H.S. Mann Corp. v. Moody,* 144 Cal. App. 2d 310, 301 P. 2d 28 (1956) [assignment of future accounts receivable]; *First National Bank v. Pomona Tile Mfg. Co.,* 82 Cal. App. 2d 592, 186 P. 2d 693 (1947) [assignment of money to be earned under existing contract]; *Henshaw v. Henshaw,* 68 Cal. App. 2d 627, 157 P. 2d 390 (1945) [assignment of interest in trust

funds subject to defeasance if beneficiary did not survive his mother]; *H.D. Roosen Co. v. Pacific Radio Pub. Co.,* 123 Cal. App. 545, 11 P. 2d 873 (1932) [assignment of inchoate contract rights]; and *Cox v. Hughes,* 10 Cal. App. 553, 102 Pac. 956 (1909) [assignment of wages]. See also *Estate of Zuber,* 146 Cal. App. 2d 584, 596, 304 P. 2d 247 (1956), restating the California public policy favoring free assignability of contingent interests.

In light of the foregoing, it is clear that a carryback loss claim is "property" or an interest in property that can be assigned and that an assignment of such an interest does not violate any policy of the State of California and would be enforceable there. Therefore, the Court Order of November 21, 1968 [R. 59], approving and authorizing the compromise between the Farrells and the Trustees, transferred the carryback loss claims to the Trustees.

B. The Assignment of the Carryback Loss Claim to the Trustees Did Not Violate the Provisions of 31 U.S.C. §203.

1. The Assignment Was Involuntary, Taking Effect by Operation of Law.

A carryback loss claim is an interest or property capable of being transferred. The Farrell carryback loss claims were transferred to the Trustees by way of an application for authority to compromise a controversy [R. 44] and a court order granting such authority and approving the compromise [R. 59]. Therefore, the Trustees are the valid holders and owners of the carryback loss claims unless the transfer violated the pro-

visions of 31 U.S.C. §203, the anti-assignment of claims statute. That statute provides in pertinent part:

> "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, . . . except as hereinafter provided, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. . . ."

In substance, this statute provides that there cannot be a voluntary assignment of a claim against the government without compliance with the statute. It is clear that the statute does not void all assignments of claims against the government. For example, in *Erwin v. United States,* 97 U.S. 392, 397, 24 L. Ed. 1065 (1878), it was held that the statute did not embrace cases where there was a transfer by operation of law and specifically that it did not bar a bankrupt's assignment of a demand against the government to an assignee in bankruptcy. Similarly, in *Goodman v. Niblack,* 102 U.S. 556, 560, 26 L. Ed. 229 (1881), it was held that the statute did not apply to an assignment for the benefit of creditors.

A further exception to the ban of 31 U.S.C. §203 are assignments effectuated by court order. It is well established that such assignments are not voluntary assignments within the purview of the anti-assignment statute. In *New Rawson Corp. v. United States,* 55 F. 2d 291 (D. Mass. 1943), a state court receiver trans-

ferred property subject to court order and the court thereafter approved the sale of property. In a later suit against the government by the assignee of the property, the court held the assignee to be the real party in interest and further held that 31 U.S.C. §203 did not render the transfer void, the court stating at page 293:

> "Section 203 does not apply to a transfer of a claim through a judicial sale under order of the court as is the case here. Such a transfer is not a voluntary assignment such as the statute makes void; it is an assignment by operation of law and not in violation of the section."

The principle that a transfer of title by operation of law does not violate the provisions of the anti-assignment statute was also proclaimed in *Western Pacific R. Co. v. United States,* 268 U.S. 271, 275, 69 L. Ed. 951, 45 S. Ct. 503, 505 (1924); *Price v. Forrest,* 173 U.S. 410, 421, 41 L. Ed. 749, 19 S. Ct. 434, 439 (1899); and in *Davis Sewing Machine Co. of Delaware v. United States,* 60 Ct.Cl. 201, 221 (1925) aff'd 273 U.S. 324, 71 L. Ed. 662, 47 S. Ct. 352 (1927).

In *Price v. Forrest, supra,* a creditor of the assignor reduced his claim to a judgment in a state court and had that court, which had jurisdiction of the parties, appoint a receiver for the assignor's claim against the government. The state court further ordered the assignor to assign his claim against the government to the receiver, who would hold it, subject to order of the court, for the benefit of those entitled thereto. As noted above, the Supreme Court held that such assignment was not voided by the provisions of the anti-assignment statute.

Appellant Trustees respectfully contend that the assignment of the carryback loss claims by the Farrells to the Trustees, made pursuant to application to compromise [R. 44] and court order [R. 59] was an involuntary assignment by operation of law and therefore outside of the scope of 31 U.S.C. §203. The assignment in issue here was the culmination of a settlement of a controversy existing between the Trustees, the Farrells and others. Prior to the Trustees' application for compromise, the Trustees had filed counterclaims to certain claims of David Farrell in a case then pending in the United States District Court, for the Southern District of California, Central Division, entitled "In the Matter of LOS ANGELES TRUST DEED & MORTGAGE EXCHANGE, a California corporation, and dba TRUST DEED & MORTGAGE MARKETS, a California corporation, Bankrupt," In Bankruptcy No. 118, 178-MC. Subsequently, the Trustees instituted an action against the Farrells by way of an application for a turnover order. Objections to jurisdiction were interposed and a hearing on said objections was continued to permit the Trustees to consolidate all of their counterclaims against the Farrells into one pleading. At this point, on October 8, 1962, the Trustees filed their application for authority to compromise controversy, which application eventually resulted in the court order approving the assignment in issue.

The authority of a trustee in bankruptcy to compromise a controversy comes from Section 27 of the Bankruptcy Act, 11 U.S.C. §50, which provides that any compromise must be "with the approval of the court." See also General Order 33. A compromise entered into without the authority or ratification of the bankruptcy

court is not binding on the parties thereto. See *Lincoln National Life Ins. Co. v. Scales,* 62 F. 2d 582 (5th Cir. 1933). Although the court to whom a petition for authority to compromise is addressed should consider the wishes of creditors, it has the last word with respect to the compromise. *Matter of National Public Service Corp.*, 68 F. 2d 859 (2nd Cir. 1934) cert. denied, 292 U.S. 641, 78 L. Ed. 1492, 54 S. Ct. 773 (1933). See generally, 2 Collier, Bankruptcy Par. 27.04 (14th Ed.), pp. 1093ff. *Cf. Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* ..... U.S. ....., ... L. Ed. 2d ....., 88 S. Ct. 1157, 1163-1169 (1968), discussing the role of the bankruptcy court with respect to a compromise in a chapter X reorganization.

Since the assignment in issue came about as a result of a compromise of a controversy between the Farrells and the Trustees, and since the compromise, and the assignment given as consideration therefor by the Farrells, would be of no force and effect unless authorized by an order of the bankruptcy court, it is therefore clear that the assignment of the carryback loss claims was an assignment by operation of law, and outside of the scope of 31 U.S.C. §203. Just as was the case in *Price v. Forrest, supra,* where an assignment to a state court receiver under order of the state court was held to be a valid assignment, so in this case, an assignment to a trustee in bankruptcy pursuant to an order of the bankruptcy court should also be held valid. To hold that an assignment made pursuant to a compromise agreement, entered into after the parties had begun litigation and effective only upon court order, is a voluntary assignment would be to stretch the meaning of "voluntary" beyond recognition.

2. Assuming Arguendo That the Assignment of the Farrell Carryback Loss Claims to the Trustees Is Found to Have Been Voluntary, Said Assignment Is Analogous to an Assignment for the Benefit of Creditors, and Thus Outside the Scope of 31 U.S.C. §203.

As recognized by the Supreme Court in *United States v. Shannon,* 342 U.S. 288, 292, 96 L. Ed. 321, 72 S. Ct. 281, 284 (1952), there are two types of voluntary assignments which are excluded from the sweep of the anti-assignment statute—transfers by will and general assignments for the benefit of creditors. The justification for the latter exclusion is that such an assignment is analogous to an assignment in bankruptcy. See *Goodman v. Niblack,* 102 U.S. 556, 560-561, 26 L. Ed. 229 (1881).

In California an assignment for the benefit of creditors may be made in either of two ways—according to the statutory scheme contained in California Civil Code §§3449-3473 or pursuant to a common law assignment which is expressly recognized in California Civil Code §3448. See *Bumb v. Bennett,* 51 Cal. 2d 294, 298, 333 P. 2d 23 (1958), and *Brainard v. Fitzgerald,* 3 Cal. 2d 157, 163, 44 P. 2d 336 (1935). A common law assignment for the benefit of creditors was upheld in *Jarvis v. Webber,* 196 Cal. 86, 236 Pac. 138 (1925), where the court noted that such an assignment was similar to a statutory assignment for the benefit of creditors, and valid if made for the benefit of creditors generally.

Appellant Trustees respectfully submit that assuming *arguendo* the assignment in issue was voluntary, it was

in the nature of a general common law assignment for the benefit of creditors. See *Jarvis v. Webber,* 196 Cal. 86, 95, 236 Pac. 138 (1925), where it was said:

> "If the conveyance is to a trustee, and the debtor intends to divest himself, not only of the title to the property, but of all control over it; if it is intended as an absolute conveyance of all of his property, and is made for the purpose of securing a distribution of its proceeds among his creditors, or a portion of them, in legal effect it is an assignment for the benefit of creditors, no matter what name or designation the parties may have given it."

In the instant case the conveyance was to a trustee, the debtor intended the conveyance to be absolute and relinquished all title to and control over the assigned property and the assignment was made for the purpose of securing a distribution of the debtor's assets among a portion of his creditors. Since a voluntary assignment for the benefit of creditors is outside the scope of 31 U.S.C. §203, the anti-assignment statute, *Goodman v. Niblack, supra,* and since the assignment in issue is in the nature of a general common law assignment for the benefit of creditors, appellant Trustees respectfully submit that the assignment of the carryback loss claims is outside the scope of the anti-assignment statute.

V.
CONCLUSION.

A carryback loss claim is an interest or property that can be assigned, and an assignment of such an interest is not against the public policy of the State of California. The Farrell carryback loss claims were assigned to the Trustee by an order of the bankruptcy court authorizing and approving a compromise of a controversy between the Farrells and the Trustees. An assignment made pursuant to a court order is an involuntary assignment by operation of law and thus outside of the scope of the anti-assignment of claims statute, 31 U.S.C. §203. The Trustees are therefore the valid owners and holders of the Farrell carryback loss claims.

Furthermore, if the transfer pursuant to court order is deemed a voluntary transfer, nevertheless the assignment of the Farrell assets qualifies as a general common law assignment for the benefit of creditors and is exempt from the provisions of the anti-assignment of claims statute, 31 U.S.C. §203.

Wherefore, appellants, Trustees in Bankruptcy of the Los Angeles Trust Deed & Mortgage Exchange respectfully request that the Order of the United States District Court for the Central District of California granting respondent's motion for order transferring monies be reversed.

GENDEL, RASKOFF, SHAPIRO & QUITTNER,

By RICHARD S. BERGER,

Attorneys for Appellants Trustees in Bankruptcy of Los Angeles Trust Deed and Mortgage Exchange.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD S. BERGER